Supreme Court, U.S.
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No. 01-1529

In The

Supreme Court of the United States

CHARLES T. HUTCHINS,

Petitioner,

v.

WILENTZ, GOLDMAN & SPITZER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Petitioner, Charles T. Hutchins, Esq. was employed as a paralegal in the creditors' rights department of the respondent, Wilentz, Goldman & Spitzer, P.C., from March 1993 until his termination on October 2, 1995. Petitioner's Appendix 6, p. 3.

On September 22, 1995, Hutchins was summoned to a meeting to discuss the severe personal problems he had with other employees which threatened his continued employment. Petitioner's Appendix 9, pp. 4-5. Hutchins thought that the real reason for the meeting and for the problems he had experienced at work since May 1995 was the belief that he had authored an anonymous memorandum which had disparaged Andrew Wagner, the other paralegal working in the creditors' rights department. Petitioner's Appendix 9, p. 5. Just three days later, he wrote a six page letter to another paralegal, Kim Haan, accusing her of spreading the rumor that he wrote the "Andrew letter." Petitioner's Appendix 6, pp. 6-7; Petitioner's Appendix 9, p. 5. In the September 25, 1995 letter to Haan, Hutchins catalogued the problems and disappointments he had experienced since May, including "an unqualified invitation to leave the bankruptcy team" in June 1995. Petitioner's Appendix 6, pp. 4-6. Addressing his accusation of Haan, Hutchins wrote at length in what can fairly be described as a threatening manner, referring to his "prior use of guerilla tactics" and his preparedness to "deal with abuse." Petitioner's Appendix 9, pp. 5-6.

Haan found the letter on her desk on September 26, 1995 and brought it to the firm personnel manager, Anne Riegle. She was "visibly upset" and "terrified" of what Hutchins might do to her. Petitioner's Appendix 6, p. 8. On

September 27, 1995, Wilentz, Goldman & Spitzer decided to terminate Hutchins' employment. However, in deference to Haan's specific request, the firm did not notify Hutchins of the decision until after the weekend. Petitioner's Appendix 6, pp. 8-9.

Approximately two weeks after his termination, Hutchins prepared an affidavit which he filed with the United States Trustee, in which he accused Wilentz, Goldman & Spitzer of engaging in billing irregularities in trustee fee applications. Petitioner's Appendix 14. Thereafter, he filed a qui tam complaint and a retaliatory discharge claim, alleging that he was discharged in retaliation for taking action in furtherance of False Claims Act litigation.

In his affidavit, Hutchins stated that on August 2, 1995, he had received an assignment from his supervisor, Louis DeLucia, Esq. to research why the Lexis electronic research seemed so high in a particular bankruptcy. Petitioner's Appendix 14, pp. 1-2, ¶ 3. He stated that he prepared a memo in response which stated that the firm had a policy of applying a 1.5 multiplier to such expenses when billing clients. Petitioner's Appendix 14, p. 3, ¶ 6; Petitioner's Appendix 14, p. 10. The memo was never discussed further with DeLucia, any other supervisor or at the September 22 meeting which addressed the issue of Hutchins' continued employment. Petitioner's Appendix 6, pp. 3-4, 6. Hutchins identified two other activities as actions which were purportedly made in furtherance of False Claims Act litigation: a request for additional billing information made on the day that he was notified of his termination and a conversation with his paralegal supervisor in which he confirmed that another paralegal

had complained about the assignment of secretarial tasks to the paralegals. Petitioner's Appendix 9, pp. 7, 50.

The United States District Court dismissed Petitioner's qui tam claim pursuant to Fed. R.Civ. P. 12(b)(6) and granted summary judgment, dismissing his retaliatory discharge claim. The Court of Appeals affirmed both decisions.[1]

REASONS FOR DENYING CERTIORARI

I

THE COURT OF APPEALS PROPERLY DECLINED TO EXPAND THE SCOPE OF LIABILITY UNDER THE FALSE CLAIMS ACT.

Petitioner contends that a conflict exists between the opinion below and the language of the False Claims Act because the Court of Appeals recognized that the Act "only prohibits fraudulent claims that cause or would cause economic loss to the government." Petitioner's Appendix 9, p. 3. Contrary to Petitioner's contentions, this holding does not conflict with the statute or established precedent. Rather, it is Petitioner's suggested interpretation which is at odds with the clear language of the Act.

[1] In light of the procedural posture of the case, the facts are presented as the lower courts received them, *i.e.*, in the light most favorable to the Petitioner. However, it must be noted that in the petition for writ of certiorari, Petitioner has made certain factual assertions which are utterly unsupported by the record, most notably, the assertions set forth at Petitioner's brief, p. 4, n.2 and at p. 28, n.14.

Petitioner correctly notes that the presentation of a false "claim" is sufficient; that there need not be actual payment by the United States for the statute to be violated. However, Petitioner's argument ignores the fact that "claim" is a defined term in the False Claims Act:

> For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient **if the United States Government provides any portion of the money** or property which is requested or demanded, **or if the Government will reimburse** such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (emphasis added). A critical element of the defined term is that the false "claim" must have the actual or potential effect of "causing the government to pay out money which it would not have otherwise paid." *United States ex rel. Alexander v. Dyncorp., Inc.*, 924 F. Supp. 292, 298 (D.D.C. 1996); see also *United States v. Lawson,* 522 F. Supp. 746, 750 (D.N.J. 1981) ("[O]nly 'actions which have the purpose and effect of causing the government to pay out money are clearly 'claims' within the purpose of the Act.'" (quoting *United States v. Silver,* 384 F. Supp. 617, 620 (E.D.N.Y. 1974), *aff'd o.b.*, 515 F.2d 505 (2d Cir. 1975)). Yet, Petitioner fails to cite 31 U.S.C. § 3729(c) or the fact that it defines "claim" anywhere in his argument.

Petitioner did not recognize the Act's limited definition of "claim" in the lower courts either. Before the Court of Appeals, Petitioner argued that the False Claims Act was violated by the mere submission of a false claim for

"approval" by the Bankruptcy Court and that it was irrelevant whether the government paid any money in response to the allegedly false claim. Petitioner's Appendix 9, page 13. The Court of Appeals specifically rejected this argument, stating:

> Extending the False Claims Act to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine and essentially permit any plaintiff to sue on behalf of the government when false or misleading statements are made to any government agent including the courts, the legislature or any law enforcement officer.

Petitioner's Appendix 9, n.15.

Petitioner now contends that "frustration of public policy objectives is enough of an injury to the government" to sustain a False Claims Act claim. Petitioner's brief, pp. 10-11. This argument is made for the first time before this Court.

None of the cases cited by petitioner stand for the proposition that the frustration of public policy would constitute the requisite harm to the United States under the False Claims Act *without* any actual or potential economic harm. In fact, none of the cases cited even contemplate that a False Claims Act claim could survive without proof of actual or potential economic harm to the United States.

In *United States ex rel. Schumer v. Hughes,* 63 F.3d 1512 (9th Cir. 1994), the Court of Appeals reversed, in part, the trial court's grant of summary judgment dismissing the complaint because there was a genuine issue of

material fact as to whether the contractor's noncompliance with Cost Accounting Standards resulted in *claims against the United States* for unallowable costs. *Id.* at 1524-25.

Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956) concerned an analogous act, the Surplus Property Act of 1944, rather than the False Claims Act. While the Court acknowledged that it was not necessary to measure damages with specificity, there was no indication that some other form of injury could suffice in the absence of economic loss. Indeed, this Court observed that, although the actual damages might be difficult to ascertain, "[i]t is obvious that *injury to the Government* resulted from the Rex Trailer Company's fraudulent purchase of trucks." *Id.* at 153-54 (emphasis added).

In *United States v. Kensington Hosp.,* 760 F. Supp. 1120 (E.D. Pa. 1991), the False Claims Act violation alleged involved Medicaid payments for "services that were not medically necessary." The claim survived a motion to dismiss not because it held the potential for frustrating public policy regarding Medicaid, but because "[p]ayment for services not medically necessary clearly constitutes an *injury to the government* sufficient to withstand a motion to dismiss." *Id.* at 1127 (emphasis added).

In *United States ex rel. Luther v. Consolidated Indus., Inc.,* 720 F. Supp. 919 (N.D. Ala. 1989), the court cited the historic purpose of the False Claims Act to reach "all fraudulent attempts to cause the Government to pay out sums of money" as well as established precedent to that effect. *Id.* at 921 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1967)). Therefore, although the "bogus invoices" submitted by the subcontractor in *Luther*

had not yet been paid, the claims fell within the scope of the False Claims Act because payment would ultimately result in a *loss to the United States. Id.* at 922.

The weight of authority supports the Court of Appeals' conclusion that a "claim," as defined by the False Claims Act, must entail actual or potential economic loss to the United States. Since the Court of Appeals correctly rejected Petitioner's argument to expand liability, it is respectfully submitted that certiorari should be denied.

II

PROPERTY HELD BY THE CHAPTER 7 BANKRUPTCY ESTATE IS NOT GOVERNMENT PROPERTY UNDER THE FALSE CLAIMS ACT.

Petitioner now contends, for the first time, that debtors' estates in bankruptcy constitute government property subject to the provision of the False Claims Act. Petitioner correctly concedes that no caselaw exists to support his position.

The argument is that because a debtor's property is turned over to a trustee, whose fees and expenses must be approved by the Bankruptcy Court and the U.S. Trustee's Office, all Chapter 7 bankruptcy estates must be considered federal property subject to the False Claims Act. Neither the Bankruptcy Code nor the False Claims Act provide support for this novel theory.

Section 323 of the Bankruptcy Code makes clear that a trustee "is the **representative** of the estate." (emphasis added). The trustee acts on behalf of, not the government, but all creditors of the estate. Mary Davies Scott et al., *Collier on Bankruptcy* ¶ 323.02 (15th ed. 2002); *see also*

California State Bd. of Equalization v. Sierra Summit Inc., 490 U.S. 844, 849 (1989) (holding that "the trustee is the representative of the estate, **not an arm of the government**." (emphasis added)). The trustee has control over the bankruptcy estate and is entitled to administer the estate property and reduce it to money. *See* Scott et al. at ¶ 323.02; *In re Edmonston*, 107 F.3d 74, 76 (1st Cir. 1997) ("As the representative of the estate, the chapter 7 trustee is under a duty to collect and reduce to money the property of the estate.").

Research has disclosed no authority indicating that a trustee's representative capacity, or management and sale authority, converts a bankruptcy estate into government property.

In sum, petitioner's attempt at this late date to revolutionize bankruptcy law does not provide a legitimate basis for a grant of certiorari.

III

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS AND REACHED CONCLUSIONS AMPLY SUPPORTED BY THE EVIDENCE.

Petitioner claims that the Court of Appeals applied an incorrect "standard" in affirming the dismissal of his retaliatory discharge claim under 31 U.S.C. § 3730(h). His complaint is not with the legal standard applied, however, since he agrees that the Court of Appeals correctly defined the issues. Petitioner's Brief, p. 19. The fact is, he simply disagrees with the conclusion reached, *i.e.*, that the evidence does not support his claim. Because this finding is amply supported by the evidence, certiorari need not be granted.

The Court of Appeals affirmed the dismissal of Petitioner's retaliatory discharge claim based upon Petitioner's failure to show (1) that he was engaged in "protected conduct" and (2) that Respondent was on notice of the distinct possibility of False Claims Act litigation and retaliated against him because of his "protected conduct." Petitioner's Appendix 9, page 48.

Petitioner identified three activities that he identified as "protected conduct," (1) the August 2, 1995 memorandum he wrote to Louis DeLucia regarding Lexis fees; (2) his comments to the paralegal supervisor regarding the use of paralegals to perform secretarial functions and (3) his request for billing documents on the date that he was notified of his termination.

The primary focus of both the Court of Appeals opinion and the Petition before the Court is the August 2 memorandum.[2]

Throughout this litigation, Petitioner has asserted that on August 2, 1995, he "received an assignment from" his supervisor, Louis T. DeLucia, Esq., to research why certain electronic research costs were so high in a particular bankruptcy case. Petitioner's Appendix 6, p. 3; Petitioner's Appendix 14, pp. 1-2, ¶ 3. Indeed, the memo

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[2] The law firm could not have discharged Petitioner in retaliation for his request for billing documents on October 2, 1995 because the decision to terminate him was made on September 27, 1995. Petitioner's Appendix 9, pp. 4-7. Petitioner's alleged complaints to the paralegal supervisor are similarly lacking as proof of "protected conduct." In his deposition, Petitioner admitted that his complaint consisted of asking her on one occasion to confirm that another paralegal had complained to her regarding the tasks assigned to the paralegals. Petitioner's Appendix. 6, pp. 4, 25.

reporting the 1.5 multiplier to DeLucia begins, "Pursuant to your request. . . . "

Accordingly, the Court of Appeals noted, "when an employee is assigned the task of investigating fraud, 'such persons must make clear their intentions of bringing or assisting in a [False Claims Act] action in order to overcome the presumption that they are merely acting in accordance with their employment obligations." Petitioner's Appendix 9, p. 43 (quoting *Eberhardt v. Integrated Design & Constr., Inc.,* 167 F.3d 861, 868 (4th Cir. 1999)). Contrary to Petitioner's assertion, the Court of Appeals did not view his assignment as disqualifying him as a qui tam relator. The Court of Appeals considered the circumstances as giving rise to a heightened burden of proving that he engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of litigation. Petitioner's Appendix 9, pp. 42-43.

This conclusion was entirely consistent with the cases cited from the Courts of Appeals in three other Circuits. Petitioner's Appendix 9, pp. 43-48. *Eberhardt, supra,* 167 F. 3d at 868; *United States ex rel. Ramseyer v. Century Healthcare,* 90 F.3d 1514, 1523 (10th Cir. 1996); *Robertson v. Bell Helicopter Textron, Inc.,* 32 F.3d 948, 952 (5th Cir. 1994).

Petitioner has cited no authority to support an argument that this conclusion is wrong or in conflict with any other Court of Appeals.

Instead, Petitioner disputes the application of this legal principle to the facts of this case. Specifically, he contends that he discovered the alleged billing fraud through inadvertence and not because he was directed to investigate the issue. Petitioner's brief, pp. 19-20; 29-30.

These arguments were considered and rejected by the Court of Appeals. Petitioner's Appendix 9, p. 53. The Court saw "no evidence that Hutchins engaged in any conduct, beyond what was specifically asked of him in accordance with his job duties." Petitioner's Appendix 9, p. 52. Petitioner's disagreement with the factual findings of the lower courts do not provide a reasonable basis for the grant of certiorari here.

Petitioner also disagrees with the Court of Appeals' conclusion that he failed to put his employer on notice of the "distinct possibility" of False Claims Act litigation.

As the Court of Appeals noted, the employee who alleges retaliatory discharge under the False Claims Act must prove that he was discriminated against "because of" his "protected conduct." Petitioner's Appendix 9, p. 32; 31 U.S.C. § 3730(h). If the employer lacks knowledge that the employee is contemplating a False Claims Act suit, there is no basis to conclude that the employer was motivated to retaliate against the employee for acting in furtherance of an action under the Act. Petitioner's Appendix 9, p. 32. In requiring the employee to "put his employer on notice of the 'distinct possibility' of False Claims Act litigation," the Court of Appeals expressly agreed with decisions reached by Courts of Appeals in four other Circuits. *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir.1998); *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994); Petitioner's Appendix 9, p. 32.

Petitioner has cited no authority in conflict with this ruling. He suggests that *Yesudian* dispenses with any requirement that the employee warn his employer of the potential for False Claims Act litigation. Petitioner's brief, pp. 21-22. His reliance is misplaced, however. While it is true that the *Yesudian* court did not require an employee to explicitly warn his employer of impending action, the court clearly did not abandon the concept that the employer must be put on notice for liability to attach:

> Nonetheless, a plaintiff still must show that his employer was aware of his protected activity. Merely grumbling to the employer about job dissatisfaction or regulatory violation does not satisfy the requirement – just as it does not constitute protected activity in the first place.

Yesudian, 153 F.3d at 743.

Failing to show any genuine conflict between the opinion below and other cases, Petitioner's argument is reduced to his contention that the Court of Appeals erred in holding that he did not put his employer on notice of the potential for False Claims Act litigation. However, the facts he cites to support this contention, Petitioner's brief, pp. 23-24, were considered by the Court of Appeals and found lacking, Petitioner's Appendix 9, pp. 48-53. Petitioner's disagreement with that conclusion does not provide a reasonable basis for certiorari to be granted here.

CONCLUSION

It is respectfully submitted that, for the reasons and authorities cited above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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